BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-319-E

In the Matter of: Application of Duke Energy Carolinas, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order	**BRIEF IN SUPPORT OF DUKE ENERGY CAROLINAS, LLC'S PROPOSED ORDER**

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On November 8, 2018, Duke Energy Carolinas, LLC ("Duke Energy Carolinas" or the "Company") filed an Application (the "Application") with the Public Service Commission of South Carolina (the "Commission") requesting authority to adjust and increase its electric rates, charges, and tariffs effective June 1, 2019. The hearing on the Application was held before the Commission on March 21, 2019 through March 27, 2019. Duke Energy Carolinas, by and through the undersigned counsel and pursuant to S.C. Code Ann. Regs. 103-851, hereby submits this Brief in Support of its Proposed Order.

This brief is submitted by the Company to address certain specific issues in dispute in this proceeding. DEC is also submitting a proposed order addressing all issues; this brief is intended to support the Company's position as described in the proposed order.

I. Rates must be set to allow a utility to earn its authorized return, through efficient operations and sound management, and disallowance of any prudently incurred cost incurred by the utility's operations serving South Carolina diminishes that opportunity.

As recently articulated by this Commission, the overarching legal standard that must be met by all electric utility rates is found in S.C. Code Ann. § 58-27-810, which provides that

"[e]very rate demanded or received by any electrical utility . . . shall be just and reasonable." Order No. 2018-804 at 19, Docket Nos. 2017-207-E, 2017-305-E, and 2017-370-E (2018). This simple "just and reasonable" standard is loaded with longstanding caselaw based on fundamental constitutional principles that support utilities' recovery of revenue sufficient to yield a reasonable return. If the rates established by the Commission are too low to "afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989); *see also* U.S. Const. amend. V; S.C. Const. art. I, § 13(A). As the U.S. Supreme Court elucidated nearly a century ago:

> A public utility is entitled to such rates as will permit it to earn a return upon the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . . . The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit, and enable it to raise the money necessary for the proper discharge of its public duties.

Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 692 (1923) (*Bluefield*). These financial soundness and capital attraction principles were reaffirmed by the Supreme Court in *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (*Hope*):

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Together, *Hope* and *Bluefield* provide "the basic principles of utility rate regulation" in South Carolina. *Southern Bell & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595 (1978); *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291 (1984).

The U.S. Supreme Court has also held that "rates which are not adequate to yield a reasonable return on the value of the property used by a utility company to furnish its service to the public are unjust, unreasonable, and confiscatory, and that their effectuation would deprive the utility of its property without due process or just compensation." *See Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 380 A.2d 126, 131 (D.C. 1977) (citing *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 408 (1926); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923)). Finally, "[w]hile regulation does not guarantee that a utility will achieve its projected revenues, it must provide the utility with a reasonable opportunity to earn a rate of return sufficient to maintain the company's financial integrity, to attract necessary capital at a reasonable cost, and to compensate investors fairly for the risks they have assumed, while protecting the relevant public interests." *Id.* at 132 (citing *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944)).

In discharging its duties in rate regulation, the Commission's decision-making is governed by these well-reasoned legal principles, which have been developed from the relevant statutes and constitutional provisions, and the cases interpreting them. *Southern Bell & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 605 (1978) (Ness, J., dissenting in part) (citing S.C. Code of Laws, 1976, Title 58, Chapter 9; *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923)). Based on these principles, the Commission must exercise its dual responsibility of

permitting utilities the opportunity to earn a reasonable return on the property it has devoted to serving the public and protecting customers from excessive or discriminatory charges by "(a) Not depriving investors of the opportunity to earn reasonable returns on the funds devoted to such use as that would constitute a taking of private property without just compensation[, and] (b) Not permitting rates which are excessive." *Id.* Ultimately, this balancing act takes place within the context of a utility setting forth proposed rates—pursuant to Title 58, Chapter 27, Article 7 of the S.C. Code of Laws—for the exclusive purpose of the utility receiving revenue sufficient to yield a reasonable return.

In addition to this constitutional lens through which the Commission must view rate proposals by utilities, there is an additional practical reason to ensure utilities recover sufficient revenue through rates. As recently stated by this Commission:

> [U]tility customers have a direct interest, not only in low rates today, but also in the financial soundness of the utilities that serve them going forward. This is especially true for electric utility customers because of the universal and immediate importance of the electric utility service to the public and the capital investment that a utility must be able to make month-by-month to provide the quality of service that customers expect and depend on.

Order No. 2018-804 at 20, Docket Nos. 2017-207-E, 2017-305-E, and 2017-370-E (2018). Such a view is shared by the South Carolina legislature. Although the recently enacted Act No. 258 of 2018 modified the definition of "public interest" as represented by ORS, the General Assembly retained a balance between "the concerns of the using and consuming public" and the "preservation of continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services." *See* S.C. Code Ann. § 58-4-10(B). Based on these principles, the Company submits that the Commission should ensure that the rates resulting from this proceeding are just and reasonable, i.e., sufficient to yield a reasonable return on the value of the property used by the Company to furnish reliable and high quality service to the public.

II. ORS's new role heightens the importance of impartial decision-making by the Commission.

In resolving a "dispute about the fundamental role of the PSC" in ratemaking decisions following the creation of the S.C. Office of Regulatory Staff ("ORS") in 2004, the S.C. Supreme Court held that this Commission retained its role as the ultimate fact-finder. "As such, it may consider all evidence before it and it does not serve as a 'rubber stamp' for ORS's recommendations." *Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 115, 708 S.E.2d 755, 765 (2011). With recent legislative changes, this dynamic is as important as it has ever been. The Commission must balance interests between customers and the Company and its shareholders, a responsibility that is no longer placed with ORS. As explained in this proceeding, the General Assembly removed from ORS the responsibilities to represent economic development and job attraction and retention in South Carolina, as well as utilities' financial viability; these responsibilities now singularly belong to this Commission. It is important to keep this in mind as the historical positions of ORS, which have now changed to some degree, addressed that financial viability concern. Accordingly, it is appropriate for the Commission to consider the manner in which financial viability and integrity were historically addressed by the ORS in considering its execution of that charge prospectively and whether policies should continue.

In spite of this new statutory dynamic, long-standing precedent protects utilities' entitlement to the opportunity to earn a reasonable return on the property it has devoted to serving the public. *See Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 408 (1926); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). For that reason, the Commission must carefully weigh

the positions and evidence proffered by the parties in determining the recovery of costs and the appropriate return on the Company's provision of service.

III. Other parties, including ORS, must proffer sufficient evidence to overcome the presumption that the Company's expenses are reasonable and were incurred in good faith.

Although the burden of proof in showing the reasonableness of a utility's costs that underlie its request to adjust rates ultimately rests with the utility, the S.C. Supreme Court has concluded that the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286 (1992) (internal citations omitted). Other parties are therefore required to produce evidence that overcomes this presumption, as well as any evidence the utility has proffered that further substantiates its position. *See Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110 (2011) ("[I]f an investigation initiated by ORS or by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures.").

As a component of this scheme of review—the utility being given a presumption of reasonableness, other parties producing evidence sufficient to overcome this presumption, and the utility proffering evidence that further substantiates its position—and as a matter of law, ORS and other parties bear the burden of production to "demonstrate a tenable basis for raising the specter of imprudence." *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 287 (1992) (citing S.C. Code Ann. §§ 37-6-605, 58-3-190, and 58-27-1960). Put another way, a utility's presumption of reasonableness "shifts the burden of production on to the Commission or other contesting party . . . ." *Id.* This burden of production is akin to that necessary in the civil proceeding context whereby a party bears the "responsibility to introduce sufficient evidence on a contested issue to have that issue decided by the fact-finder, rather than decided against the party in a preemptory decision

such as directed verdict." *Smith v. Barr*, 375 S.C. 157, 162, 650 S.E.2d 486, 489 (Ct. App. 2007) (citing *Pike v. S.C. Dep't of Transp.,* 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000)). In the absence of an adverse party meeting this burden of production, the utility's presumption of reasonableness stands. However, as discussed, should the contesting party meet its burden of production, the utility may provide evidence that further substantiates its position. *See Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110 (2011).

ORS has robust discovery and investigatory tools at its disposal. Indeed, the information requests served by ORS upon the Company routinely begin as follows: "Pursuant to S.C. Code Ann. §§ 58-4-50, 58-4-55, 58-27-160, 58-27-190, 58-27-1560, 58-27-1570, 58-27-1580, 58-33-230(F), and 58-33-277(B), the South Carolina Office of Regulatory Staff hereby makes the following request(s): . . . ." These statutory provisions speak for themselves, but, in brief, they permit ORS to: (1) review, investigate, and make recommendations to the Commission with respect to the service furnished or proposed to be furnished by any public utility; (3) require the production of books, records, and other information under oath to ORS by the utility; (4) investigate and examine the condition and management of utilities; (5) inspect the property, plant, and facilities of any electrical utility and to inspect or audit at reasonable times the accounts, books, papers, and documents of any electrical utility; and (6) require a utility to furnish all tabulations, computations, and other information required by ORS and to answer all questions submitted by ORS. These enumerated discovery and investigative powers of ORS—and the commensurate obligation on part of the Company to comply with such discovery and investigation—are in addition to the liberal discovery provisions set forth in the Commission's rules and in the South Carolina Rules of Civil Procedure, discovery provisions which are available to all parties to a proceeding. *See* S.C. Code Ann. Regs. 103-833 ("Any material relevant to the subject matter

involved in the pending proceeding may be discovered unless the material is privileged or is hearing preparation working papers prepared for the pending proceeding."); S.C. Code Ann. Regs. 103-835 ("The S.C. Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations.").

Any one of these powers can lead to evidence admissible within a general rate case. Despite the availability of these robust discovery and investigatory tools at ORS's disposal—and the requirement that ORS or another party produce evidence sufficient to overcome the Company's presumption of reasonableness—ORS proposes adjustments associated with certain coal ash litigation expenses on the basis that sufficient support was not provided by the Company. (Tr. Vol. 7, p. 1623.) As explained in ORS witness Hamm's testimony, the Company produced responses to round after round of information requests served by ORS. (Tr. Vol. 7, p. 1717-28.) In response, as explained in Company witness Smith's testimony, the Company supplied over 4 gigabytes of information, equivalent to approximately 121,000 pages of documentation, excluding the Company's pre-filed testimony. (Tr. Vol. 8, p. 1990.) Further, there is nothing in the record to suggest that the Company withheld any information, nor did ORS or any other party file any motions to compel in this proceeding, nor were there any other indications of dispute during the discovery process. Despite ORS's robust information-gathering powers, its implementation of those powers, and the Company's cooperation and responsiveness, ORS nevertheless sought no and produced no evidence to support its position or to overcome the Company's presumption of reasonableness. It is notable that the ORS relied on discovery that asked for "invoices" and very limited data. *See* Hearing Exhibit 47. Even in the most generous light to ORS, the types of information sought by ORS would not logically yield the information necessary to the inquiry it raised, such as matter descriptions, factual inquiries, case summaries, contracts or other

documents. If the ORS doesn't trouble itself to ask for such information, the Commission cannot fault the Company for not providing it in discovery. Moreover, discovery between parties is not a submission to the Commission and the Commission should not judge the adequacy of a data response through the same lens as it would a Commission filing.

A similar argument exists for incentive compensation. At hearing, ORS admits it did not do any other discovery other than to identify incentives. (Tr. Vol. 7, p. 1679.) There is no evidence in the record to demonstrate that the incentives are not appropriate or that they yield any negative operational consequence for customers. (Tr. Vol. 7, p. 1681-82.) The only expert evidence in this case that is factually specific to incentive compensation is that offered in testimony by Company Witness Metzler. (Tr. Vol. 7, p. 1677.) No party has alleged that the Company employees, particularly the "rank and file" employees, are overpaid, and how the Company decided to compensate its employees is a managerial decision, which is the sole responsibility of the Company. *See In re: Dev. Serv., Inc.*, Order No. 2005-42 at 31, Docket No. 2004-212-S (2005) ("While this Commission's decisions are often based on the prudence or imprudence of management decisions, . . . this Commission has no authority to manage the utility."). As such, there is no factual or evidentiary basis for the disallowance recommendation made by ORS.

ORS's argument that the Company did not meet its burden is at odds with the standard articulated by our Supreme Court in *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282 (1992). The scheme adopted by the Court in that opinion was that utilities are entitled to a presumption that its expenses are reasonable and were incurred in good faith. This presumption shifts the burden to an adverse party to "demonstrate a tenable basis for raising the specter of imprudence." *Id.* ORS has failed to meet this burden, which is fatal to its position and restricts the Commission to concluding that the Company's expenses are reasonable and were incurred in good faith.

IV. Known and measurable adjustments to the test year are allowed and should be permitted in this case.

The purpose of using a test year in a cost-of-service ratemaking context is very simply to match the utility's cost recovery to its expenses on a near-term basis. Or, as routinely recited by this Commission: "The test year is established to provide a basis for making *the most accurate forecast of the utility's rate base, revenues, and expenses in the near future when the prescribed rates are in effect*. The historical test year may be used as long as adjustments are made for any known and measurable out-of-period changes in expenses, revenues, and investments." *See* Order No. 2018-445, Docket No. 2016-384-S (2018) (citing *Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222 (1997)) (emphasis added); Order No. 2018-369, Docket No. 2017-28-S (2018); Order No. 2017-80, Docket No. 2016-29-WS (2017). The object of using test year figures is to reflect typical conditions. Where an unusual situation indicates that the test year figures are atypical, the Commission should adjust the test year data. *Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 312 (1984). Indeed, the Commission must make adjustments for known and measurable changes in expenses, revenues, and investments so that the resulting rates will accurately and truly reflect the actual rate base, net operating income, and cost of capital. *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 602-03 (1978). Such adjustments are within the discretion of the Commission and, although they must be known and measurable within a degree of reasonable certainty, absolute precision is not required. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 291 (1992) (citing *Michaelson v. New England Tel. & Tel. Co.*, 121 R.I. 722, 404 A.2d 799 (1979)); *Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222, 230 (1997). Therefore, the test of whether known and reasonable adjustments should be applied is not simply whether a forecast or estimate is used, but whether that forecast or estimate is shown to have a reasonable certainty of being accurate.

The words "forecast" or "estimate" are not enough to render a cost "not" known and measurable—a more specific, factual inquiry should be made to see if the particular cost or revenue item in question is reasonably certain.

The purpose of this regulatory scheme of using a test year and making adjustments based on changing conditions is to permit sufficient and accurate cost-recovery as the expenses are incurred by the utility in real-time. In other words, the purpose of this ratemaking exercise of using a test year and making appropriate adjustments is to match—as closely as possible—the utility's revenue to the costs it will incur after the rates are implemented. *See S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 602, 244 S.E.2d 278, 284 (1978). Making adjustments for changes that are known and measurable to a reasonable degree of certainty, therefore, is a reasonable and appropriate method of ensuring that the resulting rates will accurately reflect the Company's actual rate base, net operating income, and cost of capital. *See S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 602-03 (1978). As testified to by Company witness Hunsicker, because the Company's forecasted O&M expenses are premised upon fixed contracts that require specific levels of internal labor and contain specified price terms, there is a reasonable certainty that the expenses are accurately stated. For the same reason, the expenses are known and measurable: the expenses are "known" because the fixed contracts into which the Company has entered contain specified levels of internal labor, and the expenses are "measurable" because these fixed contracts contain specified price terms, which serve as the basis for the Company's forecasted expenses. (Tr. Vol. 5, p. 980-2 – 980-3.) These adjustments therefore appropriately reflect known and measurable changes and should be reflected within rates.

The two orders cited by ORS witness Smith for the proposition that the Company's forecasted O&M expense figures should be rejected, the first from 1984 and the second from 1985,

pre-date S.C. Supreme Court precedent adopting the position that adjustments "may be necessary in order that the resulting rates reflect the actual rate base, net operating income, and cost of capital." *See Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 291, 422 S.E.2d 110, 115 (1992). Further, the two cases are distinguishable from the instant proceeding. First, Order No. 1985-841 addressed an inflation adjustment on a prospective or going-forward basis. There, the Staff and Consumer Advocate argued that an inflation rate applied prospectively to all expenses (other than fuel) is generalized and speculative, and the Commission denied the Company's request for the prospective inflation adjustment. By contrast, in this case, the Company's inflation adjustment is based on data from the last ten years, is applied to the historical test year, and is known and measurable. Thus, the same concerns expressed in Order No. 1985-841 do not apply in this case. Second, in Order No. 1984-108, cited by the ORS in support of its position that the inflation adjustment should not be accepted, the Commission denied an inflation adjustment where it found that the impact of another adjustment eliminated the need for the inflation adjustment proposed by the Company. That is not the case here. In this case, as demonstrated by the Company, the expenses are known and measurable to a reasonable degree of certainty, and the Commission should permit their recovery.

V. Deferrals are a tool historically used by the Commission and participating parties to delay or mitigate rate increases and address newly incurred costs not included in current rates, and the recovery of such deferrals should be on a case by case basis, considering all relevant factors.

In the regulatory context of rate adjustments related to known and measurable changes, there is no need to consider the time value of money or the carrying costs of debt because the utility's revenue matches its expenses as they are incurred. By definition, however, deferrals present a situation in which there is a time lapse or lag between the company incurring and recovering its costs. In recognition of this lag, the Commission has often allowed a return on

deferrals during the deferral period, and, assuming a determination that the costs were prudently incurred, a return on the deferred amount during the amortization period set by the Commission. Such a position is consistent with the regulatory policy that the "just and reasonable rate is set by balancing the interest of the ratepayers and the right of the utility to earn a fair return." *S.C. Cable Television Ass'n v. S.C. Pub. Serv. Comm'n*, 313 S.C. 48 (1993) (citing *Southern Bell v. Public Serv. Comm'n*, 270 S.C. 590 (1978)). Deferral accounting treatment in this fashion was allowed by this Commission for Duke Energy Progress by Order No. 2014-138 in Docket No. 2013-472-E. It is significant, given the position taken by ORS in this proceeding, that Order No. 2014-138 addressed the deferral of both capital expenditures and incremental O&M expenses. The Commission approved deferral treatment for both capital and O&M expenses and made no distinction between the two. *See* Order No. 2014-138 at 2-4, Docket No. 2013-472-E (2014). That order also noted that ORS did not oppose the deferral accounting treatment sought by Duke Energy Progress. *Id.* at 6.

Deferrals can facilitate the implementation of new technologies, such as Smart Meters[1] and the Company's new billing system, known as Customer Connect,[2] and facilitate regulatory compliance, such as Fukushima and cybersecurity requirements.[3] Where such programs are in the customer interest, deferrals can and have been appropriate. Moreover, ORS's rote application of a position to not allow a return on any "operating costs" belies any fact-specific inquiry germane to the expenses at issue. For example, the "operating cost" related to Smart Meters would not exist but for the capital being deployed, which is also the case for the Customer Connect and grid-related deferrals in this case. Whether a cost by accounting definition is truly an "operating cost" or

[1] See Docket No. 2018-205-E, Order No. 2018-553 (2018).
[2] *Id.*
[3] See Docket No. 2013-472-E, Order No. 2016-36 (2016).

capital-related cost—as the operating expense is necessary to deploy the capital—should also be a factor relevant in a fact-specific inquiry. Moreover, as the Commission has previously found in the demand-side management and energy efficiency ("DSM/EE") context, deferring the recovery of costs results in the incurrence of carrying costs by the utility. *See, e.g.*, Order No. 2009-373 at 24, Docket No. 2008-251-E (2009) ("Under PEC's proposal, if the Company defers recovery of its DSM/EE costs, it will incur carrying costs."). Further, because the expense of the carrying costs associated with the utility's deferred cost recovery is a "legitimate part" of its rate proposal, "the company must be allowed its recovery." *Id.* The Commission further concluded that "the recovery of carrying costs is not an incentive, but merely a mechanism to provide for the recovery of costs associated with developing, implementing, and managing the DSM/EE programs." *Id.* This is exactly the dynamic that exists in this proceeding. The Commission permitted the Company to defer the recovery of incurred expenses that ORS now describes as "reasonable," the Company incurred carrying costs as a result of this deferral, and the recovery of such carrying costs would not be an incentive but would rather be a mechanism to recover prudently incurred costs.

Recovery of the carrying costs of the Company's deferred expenses would be consistent with the regulatory compact, which itself is based in case law and traditional regulatory principles. The regulatory compact, in essence, is the understanding that "[a] rate-regulated entity incurs costs in order to provide reliable service to customers within its approved service territory in a not unduly discriminatory manner **with the expectation that it will have the right to recover those prudently incurred costs, plus earn a fair rate of return on the capital that has been invested in the business to support reliable utility service**."[4] Further, permitting recovery of carrying

[4] *Accounting for the Effects of Rate Regulation* at 5, Edison Electric Institute, 2011 (emphasis added); *see also S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 280-81 (1978) ("[T]he governing principle

costs on deferred amounts would be consistent with the practice of utilities commissions in other jurisdictions in which deferrals and recovery of the type sought by the Company have been approved, such as Colorado,[5] Nevada,[6] New Jersey,[7] North Carolina,[8] Kentucky.[9]

Not only should the Commission permit the Company to recover its carrying costs because such costs are a "legitimate part" of its rate proposal and because such would be consistent with the regulatory compact and practice in other states, permitting the utility to establish a deferral and then depriving it of the opportunity to earn a reasonable return on the funds devoted to public service would be confiscatory and would constitute a taking under the U.S. Constitution. *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690, 43 S.Ct. 675, 67 L.Ed. 1176 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the

for determining rates to be charged by a public utility is the right of the public on one hand to be served at a reasonable charge, and the right of the utility on the other to a fair return on the value of its property used in the service") (citing *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679 (1923)).

[5] *See, e.g., Pub. Serv. Co. of Colo*., Decision No. C18-0762, P 18 (Colo. Pub. Utils. Comm'n Aug. 27, 2018) (granting Public Service Company of Colorado's request to establish a regulatory asset account for the incremental depreciation costs associated with the early retirement of two coal generating units and authorizing the Company to start earning a return on the regulatory asset at the utility's WACC rather than delaying decision until the Company's next base rate case in order to provide certainty to the utility and ensure customers receive the benefit of paying less on the regulatory assets than they otherwise would if the utility were not retiring the units early.)

[6] *Application of Nevada Power Company d/b/a NV Energy for Authority to Adjust its Annual Revenue Requirement*, 2017 Nev. PUC LEXIS 172 (December 29, 2017) (granting Nevada Power's request for rate base recognition and a six-year amortization period for the established voltage and volt-ampere reactive control and optimization project and Non-Standard Metering Option project regulatory assets, including corresponding carrying charges).

[7] *Re: Jersey Central Power & Light Company*, BPU Docket No. ER12111052 (Mar. 18, 2015) (finding that Jersey Central Power and Light Company's deferred O&M expenses associated with 2011 storm costs should be amortized over six over years with carrying costs on the unamortized balance).

[8] *Order Accepting Stipulation, Deciding Contested Issues and Requiring Revenue Reduction*, In the Matter of Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina, et al., NCUC Docket No. E-7, Sub 1146, et al., 15-16, 66-67 (June 22, 2018) (allowing a return on deferred coal combustion residuals expenditures, and also authorizing a regulatory asset account to defer and amortize certain operations and maintenance expenses through amortization); *Order Accepting Stipulation, Deciding Contested Issues and Granting Partial Rate Increase*, In the Matter of Application of Duke Energy Progress, LLC, for Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina, NCUC Docket No. E-2, Sub 1142 et al. (February 23, 2018) at 19 (allowing a return on unamortized balance of coal combustion residuals expenditures to be recovered over a five-year amortization period, subject to a management penalty of $30 million.)

[9] *The Application of Louisville Gas and Electric Company for Approval of Its 2004 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2004-00421 (Ky. PSC June 20, 2005) (allowing one-time ash transfer costs to be deferred and amortized over four years and authorizing the opportunity to earn a reasonable rate of return on the unamortized balance of the deferred costs in the environmental rate base).

property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."). As articulated by Justice Ness in *Southern Bell*:

> "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but *also for the capital* costs of the business. These include service on the debt and dividends on the stock."
>
> The rates established by a utility regulatory commission must not only provide the utility with the opportunity of recovering its reasonable operating expenses, but must also provide a fair and reasonable return on the investments made by the company in providing utility service to its customers.

Southern Bell & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 607-08 (S.C., 1978) (Ness, J., dissenting in part) (quoting *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 604 (1944)) (emphasis original). For these reasons, ORS's position that, on the one hand, the Company's deferred expenses are reasonable but, on the other hand, the Company should not be permitted to recover their respective carrying costs contradicts long-standing constitutional precedent and would be fundamentally unfair. Commission and court precedent recognize that utilities must be permitted to recover their expenses, as well as "a fair and reasonable return on the investments made by the company in providing utility service to its customers." *Id.* What is "fair and reasonable" in this instance would be to permit the Company to earn a reasonable return on the funds the Commission authorized it to devote to public service.

VI. The Company takes issue with ORS's characterizations of prior case law.

A number of ORS witnesses simply cited prior Commission orders as reasons for disallowing the recovery of certain expenses, and did not compare and contrast the facts of this case to the facts or analysis present in those orders. Rote application of prior Commission orders, without comparing and contrasting facts between the cases, would deprive the Company of the right to have the facts and circumstances of its case considered. For example, although ORS

Witness Gaby Smith testified that the Company's request to recover employee incentives based on stock performance would be a "vast departure" from this Commission's "decisions" on this issue, Ms. Smith references only Order No. 2012-951. (Tr. Vol. 7, p. 1607-5.) In that order, however, the Commission had adopted a settlement, styled as a Memorandum of Understanding ("MOU"), that specifically addressed the issue of incentive pay, and found that the incentive compensation expense "as embodied in the MOU adjustments" was just and reasonable. Order No. 2012-951 at 28-29, Docket No. 2012-218-E (2012). Further, the Commission's order determined that "[t]he terms of the MOU are not intended to create precedent for future proceedings," and the MOU itself stipulated that it "will not constitute a precedent or evidence of acceptable practice in future proceedings." *Id.* at 13; Order No. 2012-951, Order Ex. No. 1 at 4 Docket No. 2012-218-E (2012). The Company therefore takes exception to ORS's reliance on a decision premised upon an MOU to which the Company was not a party and which is of limited precedential value. The Company further takes exception to ORS witness Smith's representation that a Commission decision in this proceeding that deviates from the settlement adopted in a single decision by the Commission would represent "a vast departure from this Commission's decisions on this issue." (Tr. Vol. 7, p. 1607-5.) A case in which parties gave up 50 percent of a cost cannot and should not be used as precedent that the Commission decided to disallow those costs.

Similarly, ORS relied on a case in which the Commission disallowed the inclusion of future inflation in rates prospectively for the purpose of proposing the disallowance of historic inflation that cut off at the end of the historic period. That is inappropriate and a mischaracterization of Commission precedent. Whether the use of historic inflation is appropriate should be a case by case inquiry dependent upon the facts and circumstances of the case at hand. For example, if the use of historic inflation, as in the case to normalize storm costs from 10 years ago to today's cost,

results in a *lower* cost to customers than using test year or alternative calculations, then that should be considered by the Commission and a decision rendered on those facts, not on the mechanical application of a case that is not factually similar.

Another way in which rote application of prior case law has been advanced in this proceeding is SC NAACP, et al., witness Wallach's argument concerning the "long-standing precedent" regarding minimum system. The one Commission order cited by witness Wallach for the proposition that the Company's position is "contrary to long-standing Commission precedent" was premised on an unchallenged position proffered by Commission Staff. Because, in that case, "[n]o party put forth any evidence to convince the Commission that the Staff's recommendation should not be adopted," the Commission found that the minimum system concept should not be used in that case. Order No. 1991-1022 at 7, Docket No. 1991-216-E (1991). Such is hardly enough to constitute a general policy or binding precedent in this state. Given the paucity of evidence on this issue in that case and the passage of nearly thirty years since the Commission issued that order, there is nothing to prevent the Company or the Commission from considering new allocation methodologies that may be more appropriate for today's circumstances, particularly where the methodologies offered by the Company are amply supported in the record. Parties also conflate cost allocation with rate design, and while the two are related, it is perfectly and reasonably appropriate to allow one methodology for cost allocation between customer classes, but temper the effects of such allocation with rate design tools. For example, in North Carolina, the Company offered to phase in increases to the basic facilities charge such that the charge would instead be equal to 50 percent of the difference between the current rate and the actual cost basis. (Tr. Vol. 7, p. 1534-10.) The North Carolina Utilities Commission permitted an increase of approximately 18.4 percent of the difference between the current rate and the actual cost basis,

finding, "in response to parties resisting any increase in the BFC, that the modified increase in the residential BFC is appropriate." N.C.U.C. Docket No. E-7, Sub 1146, at 112 (2018). The Commission concluded that "[t]he increase in these schedules minimizes subsidization and provides more appropriate price signals to customers in the rate class, while also moderating the impact of such increase on low-income customers to the extent that they are high-usage customers such as those residing in poorly insulated manufactured homes." *Id.*

ORS also relies upon dated orders to argue that the Company's membership dues for local and state chambers of commerce and other local South Carolina organizations that promote economic development in South Carolina should be disallowed. The Company supports the establishment of an administrative docket to revisit the issue of non-allowables for the purpose of providing parties with greater clarity as to the recoverability of these items. With the elimination of local offices over the passage of time, it is perfectly appropriate to revisit those decisions to ensure the Company is appropriately engaged with the communities it serves.

VII. The repeal of the BLRA had no effect on the Company's entitlement to an opportunity to recover its prudently incurred costs and a fair and reasonable return on such costs.

Although, according to the testimony of ORS witness Morgan, ORS found that the Company's decision to incur costs to obtain the Combined Operating License and support preconstruction activities related to the Lee Nuclear Project were reasonable, it nevertheless recommends that the Commission not permit recovery of a return on this reasonable capital investment because the plant is not currently "used and useful." The Company, however, does not argue that it is entitled to recovery due to the current status of the facility. The Company instead argues that (1) at the time these costs were incurred, they were authorized both by statute and Commission order; (2) the costs were incurred for the public convenience; and (3) denying

recovery of these costs and a fair return on the costs would be confiscatory and would deprive the utility of its property without due process or just compensation.

The repeal of the Base Load Review Act ("BLRA") removed a statutory procedural vehicle for utilities seeking to recover capital costs and a return on those costs. However, the removal of this statutory procedural vehicle has no impact on utilities' constitutional entitlement to recover these costs and their associated return. The BLRA was good law at the time the Company's pre-construction costs were incurred. Further, the Company entered into a settlement agreement with ORS that would permit the Company to keep the option of constructing the Lee Nuclear facility available and to continue incurring development costs for Lee Nuclear only to the extent necessary to maintain the current schedule for obtaining a license to support a commercial operation date for the Project in the 2021-2023 time frame. The Company had no ability to seek recovery of these development costs prior to the instant rate case as it had not received a certificate, and prior orders by this Commission provided only a presumption of prudence as to the decisions and amounts stated in those orders. The Company is not now seeking recovery of abandonment costs under the repealed BLRA; it instead seeks recovery under the long-standing precedent of *Hope* and *Bluefield*, which together provide the basic principles of utility rate regulation in South Carolina. Order No. 2018-804, Docket Nos. 2017-207-E, 2017-305-E, and 2017-370-E (2018) (citing *Southern Bell Tel. & Tel. Co. v. Public Service Comm'n*, 270 S.C. 590, 595 (1978); *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984)).

The costs at the time of their incurrence were incurred to secure for customers the option of keeping the Lee Nuclear plant available. Indeed, the settlement agreement entered into in Docket No. 2011-20-E stated as follows: "The Parties agree th[at] the Commission should allow only the absolute minimum amount of dollars necessary *to keep the nuclear option available*."

Further, in approving the settlement agreement, the Commission found that "the Settlement Agreement ensures that the Lee Nuclear Station remains an option to serve customer needs in the 2021 timeframe while also providing that only the minimal amount necessary to keep the nuclear option available should be spent." "Keeping the nuclear option available" was, in fact, the public convenience served by the costs incurred, as memorialized in the settlement, and as approved by this Commission. *See Bluefield*, 262 U.S. 679, 690 (1923) ("What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.").

Because these costs were incurred for the public convenience, denying recovery of these costs and a fair return on the costs would be confiscatory and would deprive the utility of its property without due process or just compensation. "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." *Bluefield*, 262 U.S. 679, 690 (1923) (quoting *Smyth v. Ames*, 169 U. S. 467, 547 (1898)). Utilities are entitled to earn sufficient revenue not only for operating expenses but also for the capital costs of the business, including "service on the debt and dividends on the stock." *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Disallowing a utility from recovering these costs, which necessarily include "service on the debt and dividends on the stock," would be confiscatory and would deprive the utility of its property without due process or just compensation. *See, e.g.*, *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 408 (1926); *Bluefield*, 262 U.S. 679, 690 (1923). At the time the Commission permitted the Company to incur costs in the development of the Lee Nuclear facility, the parties and the Commission agreed that the public would be served by the Company incurring costs to "keep the nuclear option available." Depriving the Company now of the ability to recover these costs—including service on the debt—would deprive the Company of its property

without due process or just compensation. Should the Commission arbitrarily disregard these costs, which were incurred for the public convenience, the Commission would erroneously preclude the Company from recovering a fair rate of return. *See Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 380 A.2d 126, 132-33 (D.C. 1977).

Should the Commission determine that the Company is not entitled to full recovery of these costs, the Company points out that the Commission has previously permitted utilities to recover costs associated with canceled generation projects without including such costs within rate base. *See* Order No. 1983-92 at 47, Docket No. 1982-50-E (1983) (permitting the amortization of costs associated with the Perkins Nuclear Station and Cherokee Units 2 and 3 over a ten-year period without inclusion in rate base); Order No. 1982-284 at 17, Docket No. 1981-163-E (permitting the amortization of costs associated with the Brunswick Cooling Tower Project over a ten-year period without inclusion in rate base).

VIII. Denying the Company the ability to recover costs associated with coal ash would unconstitutionally deprive the utility of its property without due process or just compensation.

Although the burden of proof in showing the reasonableness of a utility's costs that underlie its request to adjust rates ultimately rests with the utility, the S.C. Supreme Court has concluded that the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith. *Hamm v. S.C. Pub. Serv. Comm'n*, 422 S.E.2d 110, 309 S.C. 282 (1992) (internal citations omitted). Other parties are therefore required to produce evidence that overcomes both this presumption and any evidence the utility has proffered that further substantiates its position. *See Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110, 708 S.E.2d 755, 762–63 (2011) ("Utility is correct that it was entitled to a presumption that its expenditures were reasonable and incurred in good faith . . . . [I]f an investigation initiated by ORS or by the

PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures."). Ultimately, therefore, in the absence of sufficient countervailing evidence, the Commission must conclude that the utility's expenses are reasonable and were incurred in good faith.

ORS argued that the Commission should disallow $575,000 in legal costs incurred to support the Company's ongoing coal ash litigation efforts—specifically, (1) the insurance recovery litigation the Company initiated to recuperate costs of coal ash remediation, and (2) the defense of enforcement actions brought by non-governmental advocacy groups. (Tr. Vol. 6, p. 1247-26.) Citing to a decision of this Commission published in January of this year, ORS argued that litigation costs should be disallowed when incurred to unsuccessfully defend against "claims asserting failure of the utility to adhere to state or federal law[.]" *In re: Application of Carolina Water Service, Inc. for Approval of an Increase in Its Rates for Water and Sewer Services*, Order No. 2018-802, Docket No. 2017-292-WS (2019).

The Company's coal ash litigation expenses at issue in this case are distinguishable from the litigation expenses incurred by Carolina Water Service, Inc. As witness Wright noted, the legal costs ORS seeks to disallow are not, as witnesses Smith and Hamm contend, the result of any failure to operate the Company's coal ash basins in accordance with the law. To the contrary, as witness Wright explained, the insurance litigation in question was initiated by the Company for the benefit of its customers to enforce insurance policies and obtain indemnity from insurers for costs incurred associated with coal ash remediation and is unrelated to any environmental violations. (Tr. Vol. 6, p. 1244; 1309-18.) If the Company prevails in this insurance litigation, witness Wright noted that the costs it recovers from insurers will be credited to customers. Inasmuch as the Company could obtain recovery on behalf of customers, the Company's pursuit

of such recovery is prudent. Indeed, it would be imprudent for the Company *not* to pursue this recovery on behalf of its customers. As to the other legal fees with which ORS takes issue, the Company incurred those fees to defend claims that were filed against the Company in 2013, well before the passage of either CAMA or the CCR Rule, by non-governmental entities after the state declined to pursue the underlying claims. Finally, no party to this proceeding has proffered evidence rebutting the presumption that the Company's incurrence of these costs is reasonable.

No party has argued that the Company's expenses made in compliance with the Coal Ash Management Act ("CAMA") were unreasonable or incurred in bad faith. ORS witness Witliff argues that these costs should be disallowed because they were incurred due to compliance with another jurisdiction's laws. However, this novel and unprecedented policy perspective is simply not the legal standard for a utility's recovery of its expenses. According to this state's Supreme Court, the rates established by the Commission must provide the utility with the opportunity of recovering its reasonable operating expenses, as well as provide a fair and reasonable return on the investments made by the company in providing utility service to its customers. *Southern Bell & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 600 (1978); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 604 (1944). As explained in Dr. Wright's testimony, even though some costs to serve electric customers may be incurred due to a jurisdiction-specific law, such as differences in property taxes, this does not mean that the costs of such a law are not recoverable from all customers who benefit from the electric service activity associated with the law. "Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation

of the Fourteenth Amendment." *Bluefield*, 262 U.S. 679, 690 (1923). Ultimately, utilities must be permitted to earn "a fair return upon the reasonable value of the property at the time it is being used for the public." *Id.* It is undisputed that these costs were incurred as a result of producing electricity for the Company's customers in both South Carolina and North Carolina. Denying the Company the opportunity to recover these costs would therefore be confiscatory and would unconstitutionally deprive the utility of its property without due process or just compensation. Should the Commission disallow the recovery of reasonable costs incurred as a result of providing service to customers based on ORS's flawed and unsupportable proposal, the Commission would erroneously preclude the Company from recovering a fair rate of return. *See generally Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 380 A.2d 126, 132-33 (D.C. 1977).

IX. The Commission must permit the Company an opportunity to recover sufficient revenue to cover its costs on a sufficient basis to permit a reasonable return.

As discussed above, in discharging its duties in rate regulation, the Public Service Commission must adhere to certain well established legal principles that have been developed from the relevant statutes and constitutional provisions and the cases interpreting them. *Southern Bell & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 605 (1978) (Ness, J., dissenting in part) (citing S.C. Code of Laws, 1976, Title 58, Chapter 9; *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944); *Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923)). Further, the Commission must exercise its dual responsibility of permitting utilities the opportunity to earn a reasonable return on the property it has devoted to serving the public and protecting customers from excessive or discriminatory charges by "(a) Not depriving investors of the opportunity to earn reasonable returns on the funds devoted to such use as that would constitute a taking of private property without just compensation[, and] (b) Not permitting rates which are

excessive." *Id.* ORS's repeated suggestions that the Commission should order the Company to "share" certain expenses with its investors is a red herring that contradicts nearly a century of case law. The Commission must instead authorize the Company to recover sufficient revenue to cover its costs on a sufficient basis to permit a reasonable return. Any cost-sharing ordered by this Commission would necessarily and automatically reduce the Company's ability to earn the return required under *Hope* and *Bluefield*.

As cautioned by Justice Ness in *Southern Bell*, "a utility commission may not make an arbitrary or capricious choice; its decision must be based upon evidence in the record; it cannot ignore established legal principles; and its determination must be fairly set forth in findings which are adequate to enable a reviewing court to determine if its conclusions are supported in law, logic and fact. 270 S.C. 590, 605-06 (1978) (Ness, J., dissenting in part) (internal citations omitted). The Company urges the Commission to reject ORS's overreaching and instead find, consistent with the principles and precedent relevant in this proceeding, that the Company should be permitted to recover its costs incurred in its provision of service to customers in the Carolinas and the rate of return authorized by the Commission.

X. There is no notice issue in this proceeding and the characterization raised by ORS would be contrary to the Commission's ratemaking jurisdiction.

In response to the Company giving notice to the Commission that it accepted ORS proposed BFC charges, ORS wrote the Commission suggesting that any increase in the volumetric component of customer rates to make up for the decrease in revenues from the BFC reduction might violate the provisions of Article I, § 22 of the South Carolina Constitution. (Hearing Ex. 31.) ORS's theory was that any order allowing the volumetric component of the rates in excess of the volumetric component set out in the application and exhibits would conflict with the notice

provided to customers of the DE Carolinas application. The Commission should reject the suggestion by ORS that Article I, § 22 is violated in these circumstances.

Article I, Section 22 of the South Carolina Constitution imposes due process requirements on actions of South Carolina administrative agencies: "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . ." The South Carolina Supreme Court has held that this provision guarantees persons the right to notice and an opportunity to be heard by administrative agencies. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997).

The leading case on what notice is required to afford due process is *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950) (*Mullane*), which approved of notice by publication in certain circumstances. The court in *Mullane* described the notice requirement of the due process clause as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, 339 U.S. 306, 314 (1950). The South Carolina Supreme Court has held that substantial prejudice must be shown to establish a due process claim. *Tall Tower, Inc. v. South Carolina Procurement Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987).

These authorities show that the notice provided of the DE Carolinas application in this proceeding easily meets the due process requirements of S.C. Const., Art. 1, § 22. A copy of the notice which this Commission required DE Carolinas to provide was submitted as part of Hearing Exhibit 31. The notice informed customers that the Company was asking for an overall 10% rate increase amounting to an additional $168 million in annual revenues. The notice also provided an illustration showing that a residential customer, using 1,000 kWh would see an increase of

approximately $15.57 per month. The notice described in detail the proposed increase in the BFC from $8.29 to $28.00.

The effectiveness of the notice required by the Commission in this proceeding is best illustrated by the response it generated from the customers who received it. The Commission's Document Management System ("DMS") shows that 13 parties intervened in this proceeding, including influential advocacy groups like the NAACP, Upstate Forever, the Sierra Club and the South Carolina Coastal Conservation League. The DMS also shows that no fewer than 783 people have submitted letters of protest responding to the notice. Further proof that DE Carolinas customers have had ample notice of the Company's proposal, and an opportunity to be heard on it, was shown by the very well attended night hearings held in Spartanburg, Greenville and Anderson attended by hundreds of customers where the Commission heard directly from such customers, primarily residential customers.

The large response to the notice in this proceeding shows that the notice meets the constitutional due process requirements cited in the ORS letter. It stands in stark contrast to the notice provision considered by the South Carolina Supreme Court in *Porter v. S.C. Pub. Serv. Comm'n*, 338 S.C. 164, 525 S.E.2d 866 (2000) (*Porter*).[10] In that case, the court considered a notice given for "rate adjustments" that failed to disclose that the adjustments included increases in certain rates of as much as 104%. The court found the notice lacking:

> Taken as a whole, this notice is not informative and in fact is somewhat misleading since one could conclude the "proposed rate adjustments" merely refers to the reduction in toll switched access rates.

Porter, 338 S.C. 164, 169-70 (2000). The notice of the Company's rate adjustment required by the Commission in this proceeding cannot possibly be criticized for failing to inform customers of

[10] In the *Porter* case, the court considered whether the notice had complied with the provisions of S.C. Code Ann. §58-9-530, a provision that applies to telephone utilities but not electrical utilities.

the potential increase in rates being proposed by the Company and it is clear that customers received notice "reasonably calculated" to provide them the opportunity to be heard as required by *Mullane* and related cases.

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